Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., COX COMMUNICATIONS GULF COAST, L.L.C., *et. al.* *Complainants,* v. GULF POWER COMPANY, *Respondent.*

E.B. Docket No. 04-381

To: Office of the Secretary

Attn: The Honorable Richard L. Sippel
Chief Administrative Law Judge

COMPLAINANTS' OPPOSITION TO GULF POWER COMPANY'S MOTION TO COMPEL PRODUCTION OF POLE AGREEMENTS NOT INVOLVING GULF POWER

The Florida Cable Telecommunications Association, Inc., Cox Communications Gulf Coast, L.L.C., Comcast Cablevision of Panama City, Inc., Mediacom Southeast, L.L.C., and Bright House Networks, LLC ("Complainants"), hereby oppose "Gulf Power Company's Motion to Compel Complainants to Produce Joint Use Agreements with Choctawhatchee Electric Cooperative, Inc. and Other Utilities" ("Motion"). Gulf Power's Motion is impermissibly late and utterly devoid of merit.

BACKGROUND

In its November 4, 2005 "Second Set of Interrogatories and Requests for Production of Documents," Gulf Power sought, in its Document Request No. 8, production of "all joint use pole agreements, including but not limited to all drafts thereof, between you and any entities

other than Gulf Power" (emphasis added). As set forth in Complainants' response, *see* Motion, 2, Complainants objected to this request on several grounds, including relevance, overbreadth, undue burden, and vagueness. Complainants also clearly explained that this request called for the production of *thousands* of pole attachment agreements. Complainants noted, however, that if Gulf Power meant the meaning of "joint use" to be restricted to only agreements for co-owning or jointly controlling poles (the meaning often ascribed by Gulf Power) Complainants had no such joint use pole agreements. *See* Motion, 2. Gulf Power did not file any motion to compel production of the non-joint owner agreements or ask for any clarification after receiving Complainants' response.

ARGUMENT

First, Gulf Power's Motion should be denied because it is late and beyond the discovery cut-off of February 24th. The Commission's rules state that, as to document requests, "[M]otions to compel must be filed within five business days of the objection or claim or privilege." 47 C.F.R. § 1.325(a)(2). Complainants' response was filed on November 18, 2005 so any motion to compel was due by November 23, 2005, more than three months ago.

Second, as Complainants' explained in their November 18th response, Gulf's request for pole attachment agreements that do not involve Gulf Power is not relevant to this case. Gulf Power has both the burden of production and persuasion in this matter to show that it can satisfy the standards of the Eleventh Circuit *Alabama Power* decision, which require utilities to prove, as to specific, individual *Gulf Power* poles, both that such *Gulf Power* poles are at "full capacity" and that Gulf has actually incurred a loss (that Complainants' attachments have "foreclose[d] an opportunity to sell space to another bidding firm" and that Gulf is therefore "out" "more money" as a result in the words of the federal Circuit court). *See Hearing Designation Order*, DA 04-

3048 (Sept. 27, 2004), ¶¶ 8-11; *Alabama Power v. FCC*, 311 F.3d 1357, 1369-71 (11th Cir. 2002). Gulf Power's request for pole attachment agreements between Complainants and "entities other than Gulf Power" involving poles that are not Gulf Power poles has nothing to do with the space on or capacity of Gulf's poles or Gulf's allegedly lost opportunities.

Gulf Power's argument, Motion, 2, that Complainants might be paying other, third party pole owners more money than Complainants are paying Gulf Power has nothing whatsoever to do with whether Gulf Power is entitled to collect more than its marginal costs. As Complainants stated in their response, what Complainants pay other utilities or pole owners has nothing to do with Gulf Power's poles or rates.[1] Moreover, any such payments or agreements had no bearing on the amount of "just compensation" due Gulf for access to poles that are not at full capacity or that are full but for which there is no specific lost opportunity; marginal cost of allowing the attachment (not what an attacher may have paid someone else) is sufficient. *Alabama Power*, 311 F.3d at 1370 ("a power company whose poles are not 'full' can charge only the regulated rate...."). Gulf has not – indeed cannot – explain how payments made by Complainants to any other pole owner would become relevant to the recovery of more than Gulf's marginal costs under the *Alabama Power* test that governs this proceeding.

Gulf Power's other argument, Motion, 3-4, that one of Complainants' experts' testimony will include a discussion of industry standards governing the "engineering" practices of pole attachments, has nothing to do with pole attachment agreements between Complainants and other pole owners. If Gulf wants to take issue with Complainants' expert's testimony on

[1] Complainants specifically explained: "[R]ates paid by Complainants to other utilities are irrelevant to rates on Gulf Power poles (different electric utilities would use different cost accounts from different Federal Energy Regulatory Commission ("FERC") Form 1 statements, and telephone utilities would use Automated Reporting Management Information System ("ARMIS") accounts not used by electric utilities)." See Motion, 2.

industry engineering standards, it may do so through the upcoming depositions, through cross-examination at the hearing, and through the direct rebuttal testimony of its own witnesses.

Third, as Complainants' also explained in their November 18th response, Gulf's request is so overly broad and unduly burdensome that it "literally calls for potentially thousands of pole agreements." The request is not even limited as to time or geographical area. The failure of Gulf Power to file any timely motion to compel, or even request for further information, makes this ground for objection even more important now, as Gulf seeks with its Motion, to create a diversion from Complainants' preparation for the filing of cases-in-chief and hearing next month.

Finally, Complainants objected in their November 18th response to Gulf's request that the request "is unduly vague in its use of the phrase 'joint use'; it is not clear what Gulf Power intends that term to mean." *See* Motion, 2. Complainants stated if Gulf meant the term to refer to co-owned or jointly controlled poles, then they had no such agreements. For Gulf to claim that now, for the first time in its Motion, Complainants' response was "cagey and inaccurate" or "misleading" is truly shocking. Gulf is well aware that it does not own all the poles in its service area (it has joint agreements itself with a number of other entities) and that Complainants are on those other poles as well. Indeed, Complainants clearly noted there were "thousands" of such third-party pole agreements. It is disingenuous for Gulf to suggest that they did not know that Complainants were attached to poles of other utilities (including those of Chocatawhatchee Electric Cooperative), whether governed by 47 U.S.C. § 224 or not, or that Gulf somehow only became aware of this for the first time at Complainants' depositions. *See* Motion, 3.

CONCLUSION

For the foregoing reasons, Complainants respectfully request that the Presiding Judge deny Gulf Power's Motion to Compel.

Respectfully submitted,

Michael A. Gross
Vice President,
Regulatory Affairs and
Regulatory Counsel
FLORIDA CABLE TELECOMMUNICATIONS ASS'N, INC.
246 East Sixth Ave., Suite 100
Tallahassee, FL 32303
(850) 681-1990

John D. Seiver
Geoffrey C. Cook
Rita Tewari
COLE, RAYWID & BRAVERMAN, LLP
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, DC 20006
(202) 659-9750

Counsel for

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, COX COMMUNICATIONS GULF COAST, L.L.C., COMCAST CABLEVISION OF PANAMA CITY, INC., MEDIACOM SOUTHEAST, L.L.C., and BRIGHT HOUSE NETWORKS, L.L.C.

March 16, 2006

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, *Complainants' Opposition to Gulf Power's Motion to Compel Production of Pole Agreements Not Involving Gulf Power*, has been served upon the following by electronic mail and U.S. Mail on this the 16th day of March, 2006:

J. Russell Campbell
Eric B. Langley
Jennifer M. Buettner
BALCH & BINGHAM LLP
1710 Sixth Avenue North
Birmingham, Alabama 35203-2015

Lisa Griffin
Federal Communications Commission
445 12th Street, S.W. – Room 4-C343
Washington, D.C. 20554

Ralph A. Peterson
BEGGS & LANE, LLP
501 Commendencia Street
Pensacola, Florida 32591

Sheila Parker
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Rhonda Lien
Federal Communications Commission
445 12th Street, S.W. – Room 4-C266
Washington, D.C. 20554

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, D.C. 20554

James Shook
Federal Communications Commission
445 12th Street, S.W. – Room 4-A460
Washington, D.C. 20554

Kris Monteith
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W. – Room 7-C485
Washington, D.C. 20554